Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

No. 99-1240 (10)

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

vs.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KENT S. SCHEIDEGGER
Attorney of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

29pp

QUESTION PRESENTED

Whether the Eleventh Amendment to the United States Constitution bars suits by private citizens in federal court under the Americans with Disabilities Act against non-consenting states.

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 3

Summary of argument 4

Argument 5

I

As applied to state correctional facilities, the ADA is a massive federal intrusion into a core state government function 5

II

As sweepingly defined by the ADA, "individuals with disabilities" defines a class which is neither discrete nor insular 8

III

The ADA is not a valid exercise of Congress's Fourteenth Amendment enforcement power 11

Conclusion 21

TABLE OF AUTHORITIES

Cases

Albertson's, Inc. v. Kirkingburg, 527 U. S. 555, 144 L. Ed. 2d 518, 119 S. Ct. 2162 (1999) 10

Alsbrook v. City of Maumelle, 184 F. 3d 999 (CA8 1999) 10

Atascadero State Hospital v. Scanlon, 473 U. S. 234, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985) 19

Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley, 458 U. S. 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) 12

Bogovich v. Sandoval, 189 F. 3d 999 (CA9 1999) 6

Bragdon v. Abbott, 524 U. S. 624, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998) 10

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 17, 19

City of Boerne v. Flores, 521 U. S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997) 8, 11, 14, 16, 17

Cleburne v. Cleburne Living Center, 473 U. S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) ... 9, 18, 19, 20

Cleveland v. Policy Management Systems Corp., 526 U. S. 795, 143 L. Ed. 2d 966, 119 S. Ct. 1597 (1999) 10, 11

Dellmuth v. Muth, 491 U. S. 223, 105 L. Ed. 2d 181, 109 S. Ct. 2397 (1989) 19

Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990) 16

Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676 (1880) .. 13

Florida Dept. of Corrections v. Dickson, 145 L. Ed. 2d 1131 (2000) 10

Garrett v. University of Alabama, 193 F. 3d 1214 (CA11 1999) 3

Greenholtz v. Nebraska Penal Inmates, 442 U. S. 1, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979) 5

Hayburn's Case, 2 Dall. (2 U. S.) 409, 1 L. Ed. 436 (1792) 12

Katzenbach v. Morgan, 384 U. S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966) 13

Kimel v. Florida Bd. of Regents, 528 U. S. __, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000) ... 3, 16, 18, 21

Kimel v. State Bd. of Regents, 139 F. 3d 1426 (CA11 1998) 3

Liparota v. United States, 471 U. S. 419, 85 L. Ed. 2d 434, 105 S. Ct. 2084 (1985) 13

Marbury v. Madison, 1 Cranch (5 U. S.) 137, 2 L. Ed. 2d 60 (1803) 5, 8

Marks v. United States, 430 U. S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977) 15

Morgan v. United States, 113 U. S. 476, 28 L. Ed. 1044, 5 S. Ct. 588 (1885) 12

Murphy v. United Parcel Service, Inc., 527 U. S. 516, 144 L. Ed. 2d 484, 119 S. Ct. 2133 (1999) 10

Olmstead v. L.C., 527 U. S. 581, 144 L. Ed. 2d 540, 119 S. Ct. 2176 (1999) 10

Oregon v. Mitchell, 400 U. S. 112, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970) 14, 15

Pennsylvania Dept. of Corrections v. Yeskey, 524 U. S. 206, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998) 3, 6, 10

Plyler v. Doe, 457 U. S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982) 20-

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U. S. 139, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993) 6

Saint Francis College v. Al-Khazraji, 481 U. S. 604, 95 L. Ed. 2d 582, 107 S. Ct. 2022 (1987) 13

Sherbert v. Verner, 374 U. S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) 16

Smith v. Robinson, 468 U. S. 992, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984) 19

South Carolina v. Katzenbach, 383 U. S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966) 7

South Dakota v. Dole, 483 U. S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987) 12

Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 (1880) 13

Sutton v. United Air Lines, Inc., 527 U. S. 471, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999) 10

Texas v. White, 7 Wall. (74 U. S.) 700, 19 L. Ed. 227 (1869) 12

United States v. Carolene Products Co., 304 U. S. 144, 82 L. Ed. 1234, 58 S. Ct. 778 (1938) 8

United States v. Morrison, 529 U. S. __
(No. 99-5, May 15, 2000) 5

University of Texas v. Camenisch, 451 U. S. 390,
68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981) 18

Williams (Terry) v. Taylor, 529 U. S. __,
146 L. Ed. 2d 389 (2000) 19

Wright v. Universal Maritime Service Corp., 525 U. S. 70,
142 L. Ed. 2d 361, 119 S. Ct. 391 (1998) 10

United States Constitution

U. S. Const., Art. I, § 10, cl. 1 20

United States Statutes

18 U. S. C. § 243 13

20 U. S. C. § 1415(i)(3)(B) 19

26 U. S. C. § 63(f)(2) 11

28 U. S. C. § 2254(d) 19

42 U. S. C. § 12101(a)(7) 8, 11, 19

42 U. S. C. § 12101(b)(4) 12

42 U. S. C. § 12131(2) 18, 20

42 U. S. C. § 12132 20

Pub. L. No. 101-476, 104 Stat. 1103 (1990) 19

Pub. L. No. 99-506, 100 Stat. 1807 (1986) 19

Treatises

4 R. Rotunda & J. Nowak, Treatise on Constitutional Law (3d ed. 1999) 14, 17

L. Rothstein, Disabilities and the Law (1997) 18, 19

Miscellaneous

American Heritage Dictionary (3d ed. 1992) 7, 9

H. R. 667 § 401 (104th Congress) 18

L. Greenhouse, Supreme Court Will Revisit States' Rights Bias Case, N. Y. Times (Jan. 22, 2000) 10

Levitt, The Effect of Prison Population Siege in Crime Rates: Evidence for Prison Overcrowding Litigation, 109 Q. J. Econ. 319 (1996) 2

Mackenzie, et al., Boot Camp Prisons and Recidivism in Eight States, 33 Criminology 327 (1995) 6

Scheidegger & Rushford, The Social Benefits of Confining Habitual Criminals, 11 Stan. L. & Pol'y Rev. 59 (1999) 2

Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341 (1949) 17

U. S. Dept. of Commerce, Statistical Abstract of the United States 1997 (1997) 9

U. S. Dept. of Justice, Bureau of Justice Statistics, State Prison Expenditures 1996 (1999) 2

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

vs.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to promote the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The ability of the state to protect its people from crime is the most important of all state interests. While crime is a complex phenomenon with no one cause and no one cure, the

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

imprisonment of felons is, beyond question, an essential component of the effort. In the second half of the twentieth century, we saw the tragic results of going "soft on crime." Beginning in the 1960s, the rate of incarceration per crime plunged, and, not coincidentally, the crime rate soared. See Scheidegger & Rushford, The Social Benefits of Confining Habitual Criminals, 11 Stan. L. & Pol'y Rev. 59, 61 (1999). The public eventually demanded tough sentencing, which has in recent years succeeded in bringing the crime rate down somewhat. *Ibid.* However, the rate is still nowhere near as low as it was in 1960, before our disastrous experiment with leniency, and we must still lock up a much larger proportion of our population than would have been necessary if we had not embarked on that course in the first place.

Our ability to sustain the lower crime rates and to lower them further is threatened by the high cost of incarceration. Corrections expenditures consumed over 27 billion dollars in 1996. U. S. Dept. of Justice, Bureau of Justice Statistics, State Prison Expenditures 1996, p. 16 (1999). Competing demands for limited resources inevitably call for reduced expenditures on prisons.

Capping prison populations for reasons other than sound sentencing policy can have grave, even fatal, consequences for innocent people. University of Chicago economist Steven Levitt studied the impact of artificial caps on the crime rate. See Levitt, The Effect of Prison Population Size in Crime Rates: Evidence from Prison Overcrowding Litigation, 109 Q. J. Econ. 319 (1996). See *id.*, at 335. The litigation he studied caused an increase in violent crime of 7.9 to 8.3% in the jurisdictions affected. Behind these dry statistics lies a staggering toll in human suffering. Innocent people are needlessly murdered, raped, and maimed when the state is unnecessarily prevented from incarcerating dangerous criminals.

Some limits are, of course, necessary. The Constitution, and specifically the Eighth Amendment, must be obeyed. The present case is about the authority of Congress to drive up the

cost of operating state correctional systems by mandating costs which the Eighth Amendment does *not* require. In *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998), the Court decided that the language enacted by Congress did impose the American with Disabilities Act in state prisons, even if Congress was entirely oblivious to that application of the statute. The question remains whether this accidental threat to public safety is constitutional. See *id.*, at 212-213.

In the real world of limited resources, more expensive prisons inevitably mean less use of imprisonment, blunting the effectiveness of a measure that has already reduced crime substantially and promises to do more in the future. Such a result is contrary to the interests of victims of crime and the law-abiding public, which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Plaintiff (respondent in this Court) Milton Ash is a Security Officer for the Alabama Department of Youth Services. Among his allegations is a claim that he was diagnosed with sleep apnea, his doctor recommended that he work the day shift, Joint Appendix (J. A.). 8-9, and that while other officers were placed in the first shift, he was not. *Id.*, at 9.

Plaintiff filed suit against the Department in Federal District Court, alleging violations of numerous federal statutes, including the Americans with Disabilities Act (ADA). The District Court granted summary judgment for the Department on the ADA claim, deciding Ash's case together with another case presenting similar issues. The Eleventh Circuit reversed, holding that the ADA was a valid exercise of the Enforcement Clause of the Fourteenth Amendment and that states do not have Eleventh Amendment sovereign immunity. See *Garrett* v. *University of Alabama*, 193 F. 3d 1214, 1218 (CA11 1999). This holding was based on the Court of Appeals' then-binding precedent in *Kimel* v. *State Bd. of Regents*, 139 F. 3d 1426, 1433 (CA11 1998), subsequently reversed, 528 U. S. __, 145

L. Ed. 2d 522, 120 S. Ct. 631 (2000). On April 17, 2000, this Court granted the Department's certiorari petition, limited to the issue of the state's Eleventh Amendment immunity from the ADA claims.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act, as applied to state prisons, is a massive federal intrusion into the single most important function of state government: the protection of its citizens from crime. If enforced, it will dictate the allocation of state resources in a manner which may not be in the best interests of the people of the state as a whole, and, more importantly, it will separate the decision-making authority from the elected officials accountable to the people and vest it in the federal judiciary and bureaucracy.

Notwithstanding Congress's declaration, "individuals with disabilities," as sweepingly defined by the ADA, are not a "discrete and insular minority," or even a recognizable class at all. While a more focused definition might have qualified for that designation, the protected class *as actually defined* has not been the target of the kind of discrimination that has warranted major congressional intervention in the operations of state government.

The ADA is not a valid exercise of Congress's Fourteenth Amendment enforcement power. Constitutional violations are a minuscule subset of government decisions that would be actionable under ADA. The Act fails the congruence and proportionality test by a wide margin. Hence, Congress had no authority to abrogate the state's Eleventh Amendment immunity.

ARGUMENT

I. As applied to state correctional facilities, the ADA is a massive federal intrusion into a core state government function.

"[T]he suppression of [violent crime] has always been the prime object of the state's police power . . . ." *United States* v. *Morrison*, 529 U. S. __ (No. 99-5, May 15, 2000) (slip op., at 15). To the extent that the Americans with Disabilities Act (ADA) burdens the states correctional facilities, it does not merely impact *a* core state government function, it impacts *the* core state government function.

The burden the ADA places on state correctional facilities will, we understand, be described in the brief of *amicus* Association of State Correctional Administrators, and *amicus* CJLF will not duplicate that discussion here. We will, however, note a few of the more troubling applications of ADA from the standpoint of separation of powers and federalism.

Parole is a vitally important decision in the management of the prisons. "[T]he choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 8 (1979). This is the quintessential discretionary decision entrusted to the executive branch of state government. Whatever minimal requirements the judiciary may impose on the process of making this decision, see *id.*, at 16, it would be preposterous to assert that judges, especially federal judges, are empowered to dictate the criteria of the decision.

Two centuries ago, it was "scarcely necessary for the court to disclaim all pretension to . . . jurisdiction . . . to inquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 170 (1803). Regrettably, respect for federalism and

the separation of powers has sunk so low that it is very necessary today.

In *Bogovich* v. *Sandoval*, 189 F. 3d 999 (CA9 1999), prison inmates claimed that "considering a prisoner's substance abuse history when making parole decisions violates Title II of the ADA." *Id.*, at 1001. Based on the considerations set forth in *Greenholtz* and *Marbury*, one would expect that such a request for federal judicial intrusion into a core, discretionary state executive function would be promptly and emphatically rejected. Unbelievably, this case remains mired in litigation *four years* after it was filed.

Pennsylvania Dept. of Corrections v. *Yeskey*, 524 U. S. 206 (1998) provides another example. Yeskey challenged his exclusion from a "boot camp" program, which was a decision the prison administrators made in the good-faith belief he was medically unsuited for the program. See *id.*, at 208. As our society continues its long, so-far largely fruitless quest to find corrections programs which actually correct, it is essential that we be able to experiment, innovate, and see what works. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Pennsylvania Dept. of Corrections* v. *Yeskey*, No. 97-634, p. 20; Mackenzie, et al., Boot Camp Prisons and Recidivism in Eight States, 33 Criminology 327, 353-354 (1995). If every suitability determination in every innovative program involving any of the breathtaking sweep of conditions that arguably qualify as "disabilities" under the ADA triggers a federal lawsuit, it is easy to see how administrators with limited resources may well conclude that the price of innovation is just too high. Although we are informed that the state did eventually prevail on remand in *Yeskey*, the damage is done by the litigation itself. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 145 (1993).

Finally, there is the present case, *Alabama Dept. of Youth Services* v. *Ash*. Correctional facilities must be staffed around the clock. Shift work is undesirable, to put it mildly. The period from midnight to 8:00 a.m. is not called the "graveyard

shift" for nothing. See American Heritage Dictionary 791 (3d ed. 1992).

Assignment of personnel to shifts involve many considerations. Seniority rights, collective bargaining agreements, rewarding good performance, accommodating working parents, and keeping a mix of experienced personnel with rookies on all shifts are a few of the important considerations.

Respondent Milton Ash, a Security Officer with Alabama Department of Youth Services was diagnosed with sleep apnea, and his doctor recommended he work the day shift. See Complaint (Ash) ¶ 9, J. A. 8-9. Ash further alleges that other officers were placed in the first shift, but he was not. *Id.*, ¶ 11, J. A. 9. He does not allege that the administration did not have valid management reasons for their decision. The claim, in essence, is that under the ADA accommodating Ash's "disability" automatically trumps all other considerations, or, at the very least, subjects this elementary management decision to second-guessing by an unelected and unaccountable federal judge, who has no responsibility for the adverse consequences of elevating one person's interests above everyone else's.

However well intended, the ADA does grave damage to the careful and intricate separations of powers created by the Constitution. It subjects to judicial scrutiny the most basic questions vested in the discretion of executive officers. It federalizes issues which properly belong to state and local government. Intrusion of this magnitude can be "appropriate," within the meaning of the Civil War Amendments' enforcement clauses, when necessary to correct a major, pervasive, and long-standing violation of the Constitution. The most notorious example is the 75-year *de facto* nullification of the Fifteenth Amendment in an entire region of the country. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 310-314 (1966). Nothing remotely approaching that has occurred in relation to the ADA. The magnitude of the intrusion is not proportional to any pattern of violation of the Constitution.

II. As sweepingly defined by the ADA, "individuals with disabilities" defines a class which is neither discrete nor insular.

Past cases on the scope of Congress's Fourteenth Amendment enforcement power have noted Congressional findings of constitutional violations, or the lack or weakness of such findings, to bolster the arguments for or against a particular exercise of the power. See *City of Boerne* v. *Flores*, 521 U. S 507, 530-532 (1997) (contrasting records in Religious Freedom Restoration Act and Voting Rights Act). In the ADA, Congress included the following finding:

"The Congress finds that— . . .

> "(7) individuals with disabilities are *a discrete and insular minority* who have been faced with restrictions and limitations, subjected to a history of *purposeful* unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. . . ." 42 U. S. C. § 12101(a)(7) (emphasis added).

The phrase "discrete and insular minority" is an obvious allusion to the famous footnote in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938) and clearly intended to shore up a shaky equal protection basis for the statute. The findings of Congress are, of course, entitled to great respect. They are not, however, entitled to unquestioning acceptance. If they were, the very purpose of having a written constitution would be subverted. "To what purpose are [Congress's] powers limited, and to what purpose is that limitation committed to writing, if the limits may at any time, be passed by those intended to be restrained?" *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 176 (1803). The Fourteenth

Amendment grants powers to Congress, while the inherent federal structure confirmed by the Tenth Amendment reserves powers to the states. If Congress can shift the line between the two simply by making findings based on power rather than reality, the federal structure collapses, and the United States become the Consolidated State.

For doubt that finding (7) is valid if applied to the Act's sweeping definition of "disability," we need look no further than finding (1), which includes "some 43,000,000 Americans" in the category. That would be about one-sixth of the population. See U. S. Dept. of Commerce, Statistical Abstract of the United States 1997, p. 21 (1997) (1990 population was 248,718,000). Outside the unique context of race, it staggers the imagination that a group that large could really be "discrete and insular" within the meaning of *Carolene Products.*

"Discrete" means "constituting a separate thing, distinct." American Heritage Dictionary 532 (1992). "Insular" means, in the sense that fits this context, "suggestive of the isolated life of an island." *Id.*, at 936. A "discrete and insular minority," therefore, refers to a group segregated from the mainstream of American society and not participating in it.

Without question, there are small subsets of the set of "individuals with disabilities" who did, at one time at least, fit that description. Certain categories of mental illnesses and impairments, including schizophrenia and retardation, have in times past been subject to the kinds of stigma and isolation that this term implies. See *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 461-464 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part). An act addressed to remedy the injustices against a class so defined might fall within the power of Congress under section 5 of the Fourteenth Amendment. The ADA bears little resemblance to such an act.

To illustrate the reality of ADA litigation, let us survey the conditions asserted as "disabilities" by the plaintiffs in the ADA cases in which this Court has granted certiorari. These cases

include the conditions of high blood pressure, *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 208 (1998); *Murphy* v. *United Parcel Service, Inc.*, 527 U. S. 516, 518 (1999), asymptomatic AIDS, *Bragdon* v. *Abbott*, 524 U. S. 624, 628 (1998), an injured heel and back, *Wright* v. *Universal Maritime Service Corp.*, 525 U. S. 70, 74 (1998), complications from a stroke, *Cleveland* v. *Policy Management Systems Corp.*, 526 U. S. 795, 798 (1999), severe myopia, *Sutton* v. *United Air Lines, Inc.*, 527 U. S. 471, 475 (1999), amblyopia, *Albertson's, Inc.* v. *Kirkingburg*, 527 U. S. 555, 559 (1999); *Alsbrook* v. *City of Maumelle*, 184 F. 3d 999, 1002 (CA8 1999), cert. dismissed, 146 L. Ed. 2d 215 (2000), mental retardation, schizophrenia, and "personality disorder," *Olmstead* v. *L. C.*, 527 U. S. 581, 593 (1999), a heart condition, *Florida Dept. of Corrections* v. *Dickson*, 145 L. Ed. 2d 1131 (2000) (dismissing cert.); see L. Greenhouse, Supreme Court Will Revisit States' Rights Bias Case, N. Y. Times, Jan. 22, 2000, p. A12, col. 5, and breast cancer, asthma, and sleep apnea, in the present case.

These cases illustrate that the scope of conditions which have been the subject of ADA litigation has vastly exceeded any conceivable definition of "discrete and insular minorities." To be sure, the situation has been considerably improved by the exclusion of correctable conditions in *Sutton*. See 527 U. S., at 494-495 (Ginsburg, J., concurring). Even so, the conditions which remain the subject of ADA litigation remain far beyond the previously stigmatized and isolated conditions that might have warranted Congress's finding.

Could anyone seriously argue that persons whose vision can only be corrected to 20/30, rather than 20/20, see *Alsbrook*, *supra*, 184 F. 3d, at 1002, have been the objects of widespread discrimination, isolation, and stigmatization by society? Have persons with sleep apnea been disenfranchised and rendered politically powerless? Have persons with high blood pressure, see *Yeskey*, *supra*, 524 U. S., at 208, been denied participation in the mainstream of American life?

Of all the plaintiffs in these cases only three (L. C. and E. W. with retardation and schizophrenia and Abbott with a dreaded, contagious disease) have the kinds of conditions that have been subject in the past to the kind of invidious discrimination that would even arguably give rise to a claim of constitutional violation. *Cleveland* demonstrates the exact opposite. Plaintiff in that case was the beneficiary of a generous system of public assistance set up to assist the disabled decades before the ADA. See 526 U. S., at 797, 801. Other examples of governmental good will toward the disabled abound. See, *e.g.*, 26 U. S. C. § 63(f)(2) (additional income tax exemption for the blind).

"Individuals with disabilities" within the meaning of the ADA is not even a recognizable category in society outside the context of the Act. If one were to describe the above plaintiffs' conditions to the proverbial person on the street and ask how many of them are "disabled," the answer would be less than half. How can Congress credibly declare a group of people a "discrete and insular minority" when Congress itself has created the group by lumping together people who would not ordinarily be considered members of any recognizable set?

Notwithstanding the respect and deference generally due to Congress, the finding in 42 U. S. C. § 12101(a)(7) is patently false. The class of persons to whom the ADA applies is not a "discrete and insular minority" and has not been the subject of "purposeful unequal treatment."

III. The ADA is not a valid exercise of Congress's Fourteenth Amendment enforcement power.

Section 5 of the Fourteenth Amendment confers upon Congress the power to enforce the Amendment by appropriate legislation. That section did not authorize the destruction of the federal system and its replacement by a unitary government, with the state as mere departments. See *City of Boerne* v. *Flores*, 521 U. S. 507, 520-524 (1997). When the ink was

barely dry on the Amendment's ratification, this Court declared, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White*, 7 Wall. (74 U. S.) 700, 725 (1869), overruled on other grounds, *Morgan* v. *United States*, 113 U. S. 476, 496 (1885). Section 5 of the Fourteenth Amendment did not change that.

Everyone can agree that the accommodation of disabled persons and their access to government programs is a desirable goal. The worthiness of the goal, however, does not justify the means. Indeed, the first statute ever declared unconstitutional by federal judges was a highly commendable act for the relief of disabled veterans of the American Revolution and the widows and orphans of those who had fallen. Understandably, the judges were somewhat embarrassed in announcing their decision that Congress had violated the separation of powers in its choice of means to implement this salutary law, but announce it they did. See *Hayburn's Case*, 2 Dall. (2 U. S.) 409, 410-411, n. (a) (1792) (describing circuit decisions).

So it is in this case. If Congress had really intended that all prisoners and prison employees be fully accommodated and mainstreamed for all disabilities, sweepingly defined, it could unquestionably have done so under the spending power by providing the necessary funds and conditioning receipt on compliance with certain standards. See *South Dakota* v. *Dole*, 483 U. S. 203, 212 (1987) (constitutionality of such statutes); *Board of Ed. of Hendrick Hudson Central School Dist.* v. *Rowley*, 458 U. S. 176, 179 (1982) (describing Education of the Handicapped Act). Instead, the ADA invokes the Fourteenth Amendment and the commerce power, see 42 U. S. C. § 12101(b)(4), and hands the bill to the states. Neither of these powers supports the application of the ADA to state prisons. The present case involves only the Fourteenth Amendment; the Commerce Clause question must await another case. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Pennsylvania Dept. of Corrections* v. *Yeskey*, No. 97-634, pp. 16-20 (Commerce Clause argument).

The most straightforward, and least controversial, use of the Fourteenth Amendment enforcement power is to provide remedies to give practical effect to the substantive guarantees. For example, the Fourteenth Amendment, by its own force, forbids racial discrimination in selecting juries, see *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880), but only Congress can make such discrimination a crime and punish it. See 18 U. S. C. § 243; *Ex parte Virginia*, 100 U. S. 339, 345-346 (1880); cf. *Liparota* v. *United States*, 471 U. S. 419, 424 (1985) (no federal common law crimes). The difficult question arises when Congress purports to prohibit a state government practice which does not violate the Fourteenth Amendment.

Katzenbach v. *Morgan*, 384 U. S. 641 (1966) was once thought to stand for the proposition that Congress could expand the protections of the Fourteenth Amendment beyond the substantive reach of the Amendment itself. That case involved a statute in which Congress had provided that persons educated in "American-flag schools" in languages other than English could vote, notwithstanding state English-literacy requirements. *Id.*, at 643.

The Court upheld the statute, thereby permitting Puerto Ricans to register to vote in New York, even if they could not read English. This result was reached without overruling a precedent that had upheld literary tests as a general matter. *Id.*, at 649. On its facts, this seems an unobjectionable result. The act involved the right to vote on a ground related to ethnicity. While literacy tests may be generally valid, Congress determined that in this limited situation those laws operated in practice to disenfranchise an ethnic group in violation of the Fifteenth Amendment.[2] That judgment was not necessarily inconsistent with that general rule.

---

2. Puerto Ricans are, of course, not a "race" as that term is used today. In the Reconstruction era, though, the word "race" was used to refer to smaller groups. See *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 610-611 (1987).

The *Morgan* majority, however, used sweeping language "which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *City of Boerne*, *supra*, 521 U. S., at 527-528. Subsequent cases have not followed that interpretation of *Morgan*.[3]

Oregon v. *Mitchell*, 400 U. S. 112 (1970) sounded the retreat. The Court was badly splintered, and only Justice Black concurred in all four of the Court's separate holdings. The issue most pertinent to the present question was Congress's attempt to lower the voting age to 18 in state elections, as well as federal, thus invading the traditional power of the state to regulate its own elections.

Justice Black interpreted the Fourteenth Amendment as giving Congress authority to regulate in this area only to prevent racial discrimination. *Id.*, at 130. Justice Harlan expressly rejected the "notion of deference to congressional interpretation of the Constitution, which the Court promulgated in *Morgan* . . . ." *Id.*, at 209 (opinion concurring in part and dissenting in part). The provision's "validity therefore must rest on congressional power to lower the voting age as a means of preventing *invidious discrimination that is within the purview of [the Equal Protection] clause*." *Id.*, at 212 (emphasis added). Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, took a narrower view of *Morgan*. They understood that it had merely upheld Congress's determination that there had been actual discrimination against Puerto Ricans in New York, an Equal Protection violation by any standard, and that the extension of the vote was the remedy for this

---

3. "The broad language in *Morgan*, purporting to give Congress power to define equal protection, was unnecessary to the decision of the case. The Court's language appears to be an alternative holding rather than dictum, but subsequent decisions show that the Court has retreated from the more far-reaching implications of *Morgan*." 4 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 19.3, p. 8 (3d ed. 1999).

violation. *Id.*, at 295-296 (opinion concurring in part and dissenting in part).

Viewed through the retrospective lens of *Marks* v. *United States*, 430 U. S. 188, 193 (1977), the opinion concurring on the "narrowest grounds" is probably Justice Stewart's. Congress has the power "to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause . . . ." *Mitchell*, *supra*, 400 U. S., at 296 (concurring in part). It does not have the power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause . . . ." *Ibid.* To the extent *Morgan* may have been contrary, it did not survive *Mitchell*.

The other relevant holding of *Mitchell* involved Congress's temporary suspension of all literacy tests for voting nationwide. Given the sorry history of the racially discriminatory use of these tests to violate the very core of the Fifteenth Amendment, the Court had little trouble in agreeing unanimously that this was a proper exercise of Congress's enforcement power under that amendment. *Id.*, at 118, 132 (opinion of Black, J.). This included the *Morgan* dissenters. *Id.*, at 216 (opinion of Harlan, J.); *id.*, at 282-283 (Stewart, J., concurring in the judgment).

Taken together, these opinions indicate that before the enforcement power of Congress can apply there must first be a violation of the substantive requirements of the Fourteenth or Fifteenth Amendments. Where there are substantial violations, a remedy that sweeps in some nonviolations may be necessary. The problem of literacy tests provides a good example. Litigating each application of the tests to determine if it is discriminatory would be impractical, leaving the choice between tolerating large-scale violations of the Fifteenth Amendment or sweeping out some good-faith, nondiscriminatory uses of the tests along with the bad-faith uses.

The voting age question provides a clear counterexample. The 21-year-old voting age did not serve as an instrument for evading the Constitution. These clearly constitutional, if

possibly unwise, statutes did not produce *de facto* constitutional violations on a large scale by burdening people deprived of their rights with case-by-case litigation. If these laws produced any constitutional violations at all, which is doubtful, the "remedy" included within its sweep vastly more constitutional applications than unconstitutional applications.

Twenty-seven years later, the question that fractured the Court in *Mitchell* produced not a single dissent in *City of Boerne* v. *Flores*, *supra*. The question was whether Congress had the authority to forbid actions of state and local government that were constitutional under the Free Exercise Clause as construed in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), but which would have violated the rule of *Sherbert* v. *Verner*, 374 U. S. 398 (1963), abandoned in *Smith*.[4] The only dissents were on the ground that *Smith* should be reconsidered. *City of Boerne*, *supra*, 521 U. S., at 545 (O'Connor, J., dissenting); *id.*, at 565-566 (Souter, J., dissenting); *id.*, at 566 (Breyer, J., dissenting). Justice O'Connor largely agreed with the majority on the Congressional power question, *id.*, at 545-546, and Justice Breyer agreed in part. *Id.*, at 566. Justice Souter took no position on the point. *Id.*, at 565-566.

City of Boerne confirmed, in a coherent majority opinion, the same conclusion that must be extracted from the splintered opinions in *Oregon* v. *Mitchell*. The power of Congress is remedial, not substantive. 521 U. S., at 527. "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *Id.*, at 530. The "congruence and proportionality" test is now solidly established. See *Kimel* v. *Florida Bd. of Regents*, 528 U. S. ___, 145 L. Ed. 2d 522, 541, 120 S. Ct. 631, 645 (2000).

---

4. Congress's Fourteenth Amendment enforcement power is involved because the Free Exercise Clause is deemed to be incorporated in the Due Process Clause. See *City of Boerne*, 521 U. S., at 519.

In a sense, the problem of "appropriate legislation" under section 5 of the Fourteenth Amendment mirrors the problem of equal protection under section 1. It is a question of legislative classification. A classic law review article used set theory to explain the problem. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 347 (1949); see also 4 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 18.2, pp. 209-211 (3d ed. 1999). The legislation aims at some mischief (M) and applies to all persons with some trait (T). If the sets T and M are identical, the law is perfectly reasonable. If they are entirely separate, it is irrational. If T is a subset of M, the law is underinclusive, but this is generally not a problem. If M is a subset of T, the law is overinclusive. It applies to people who do not present the problem at which the law is aimed. That can be an equal protection violation.

Mitchell, *Boerne*, and *Kimel* are analogous. Congress cannot be expected to match its remedies precisely to constitutional violations. A rule that Congress can never forbid any state practice that does not violate the Fourteenth Amendment would force Congress to always be seriously underinclusive. However, an act which is vastly overinclusive cannot stand. Congress cannot throw out a whole nursery full of babies to dispose of a few ounces of bath water.

Assuming *Smith* to be correct, as we must unless and until this Court overrules it,[5] the act in *Boerne* was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, *supra*, 521 U. S., at 532. "Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Ibid.*

---

5. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment).

These words could just as easily have been written about the ADA. Every agency at every level of government must reexamine every program and decide whether to make modifications and provide the necessary "auxiliary aids and services" to accommodate a wide variety of disabilities. See 42 U. S. C. § 12131(2). If they cannot afford to do so, then they must terminate the program. In the case of prisons, where programs to benefit prisoners are under heavy assault already,[6] termination may very often be the choice.

Cleburne v. *Cleburne Living Center*, 473 U. S. 432 (1985) established that mental retardation is not a "quasi-suspect classification" for the purpose of equal protection analysis. *Id.*, at 446. The test for differential treatment is therefore whether the distinction is "rationally related to a legitimate governmental purpose." *Ibid.* For the reasons stated in *Cleburne*, the same rule should apply to the disabled generally.[7]

First, unlike race, disability is often relevant. Cf. *Cleburne*, 473 U. S., at 442-443. The most common reason for a refusal to make an accommodation is simply an unwillingness to spend the extra money required. See, *e.g.*, *University of Texas* v. *Camenisch*, 451 U. S. 390, 392 (1981); *id.*, at 398-399 (Burger, C.J., concurring) (issue was not whether Camenisch could attend, but merely who would pay the additional expense). Expense would only be irrelevant in a program with unlimited resources. In the real world, expense is always relevant. Cf. *Kimel*, *supra*, 145 L. Ed. 2d, at 543, 120 S. Ct., at 646 (noting that age classification is generally relevant and rational).

---

6. For example, H. R. 667 § 401, passed by the House in the 104th Congress, would have removed all strength-training activities from federal prisons. It is not difficult to see how a lawsuit demanding accommodation in such a program, and the attendant expense, would be the last straw.

7. The author of a treatise on the subject, who generally takes an expansive view of rights of the disabled, concurs with this assessment. See L. Rothstein, Disabilities and the Law § 1.02, pp. 9-10 (1997).

Second, the steady stream of legislation to benefit the disabled negates any notion that the disabled are the kind of politically powerless minority in special need of judicial protection from legislative animosity. Cf. *Cleburne*, *supra*, 473 U. S., at 443-445.[8] Indeed, the disabled seem to have a unique capacity to get Congress to act swiftly in reaction to any adverse decision from this Court. *Smith* v. *Robinson*, 468 U. S. 992, 1021 (1984), which denied attorney's fees under the Education of the Handicapped Act (EHA), was abrogated only two years later. See 20 U. S. C. § 1415(i)(3)(B), formerly subd. (e)(4)(B). *Dellmuth* v. *Muth*, 491 U. S. 223, 232 (1989) held, as a matter of statutory construction, that Congress had not intended to abrogate Eleventh Amendment immunity in the EHA. Congress abrogated the specific holding of *Dellmuth* the next year. Pub. L. No. 101-476, 104 Stat. 1103, 1106 (1990).[9] *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985) met the same fate on the same point regarding the Rehabilitation Act. Pub. L. No. 99-506, 100 Stat. 1807 (1986).[10]

Other groups can only gaze upon this astonishing record of legislative triumph with envy. It took victims of crime *43 years* to correct the misinterpretation of the federal habeas corpus statute. Compare *Brown* v. *Allen*, 344 U. S. 443, 499 (1953) (Frankfurter, J., concurring), with *Williams (Terry)* v. *Taylor*, 529 U. S. ___, 146 L. Ed. 2d 389, 430 (2000) (construing new 28 U. S. C. § 2254(d)).

Congress's declaration that the disabled are "relegated to a position of political powerlessness," 42 U. S. C. § 12101(a)(7), is far from self-validating. Indeed, it is close to self-negating.

---

8. This point combines the *Cleburne* Court's second and third points.

9. Whether Congress actually had the authority to abrogate is another question, closely related to the question in the present case.

10. There are many other statutes benefitting the disabled, of course. The history is described in Rothstein, *supra*, at 3-19.

Any group with enough clout to convince Congress to declare it "powerless," in an obvious attempt to overturn one of this Court's precedents, is powerful indeed.

Cleburne's final point was that if the mentally retarded were accorded "quasi-suspect" status, a wide variety of other groups would be as well. 473 U. S., at 445-446. The *Cleburne* Court stated it was unwilling to do so. *Id.*, at 446. The obvious reason is that such a step would vastly increase judicial scrutiny of legislative decisions, with a corresponding abridgment of the people's right of self-government. If small subsets of the "disabled" that actually have been targets of discrimination are not "quasi-suspect," then clearly the vastly broader class defined by the ADA is not. State action regarding this class is constitutional if it passes the rational basis test.

Applying the rational basis test, saving money, is *always* a legitimate state interest. If more money is spent on a program, it must be either cut from another program, drained from the general economy through a tax increase, or borrowed so as to encumber the future.[11] Of course, a state cannot save money by arbitrarily cutting off a disfavored group which is not distinguishable on any basis relevant to that goal. See *Plyler* v. *Doe*, 457 U. S. 202, 229 (1982) (exclusion of "undocumented" children from school). Where the higher cost of including a particular person is the very essence of the classification, though, it cannot be seriously contended that the distinction is not rationally related to the legitimate purpose.

Obviously, the requirement to modify practices and provide "auxiliary aids and services," 42 U. S. C. § 12131(2); *id.*, § 12132, sweeps vastly further than the Equal Protection Clause. The over inclusiveness of this law is as great or greater than those in *City of Boerne* and *Kimel*. Under those prece-

---

11. The federal government has a fourth option: print paper money. The states do not. U. S. Const., Art. I, § 10, cl. 1.

dents, this statute cannot be an exercise of Congress's enforcement power under the Fourteenth Amendment.

Unlike the Religious Freedom Restoration Act, though, this statute does not fall, at least not in its entirety, when the Fourteenth Amendment support crumbles. Most of the statute in most of its applications, *e.g.*, to businesses in interstate commerce, is a valid exercise of the commerce power. The abrogation of Eleventh Amendment immunity, though, does depend on the Act's Fourteenth Amendment basis. *Kimel*, *supra*, 145 L. Ed. 2d, at 539-540, 120 S. Ct., at 643-644. The federal courts have no jurisdiction to hear this case.

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be reversed.

June, 2000

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation